



November 23, 1999

Mr. Paul Elliott
Director of Hearings
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

OR99-3378

Dear Mr. Elliott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129027.

The State Office of Administrative Hearings ("SOAH"), received a request for "a copy of all proposals [issued by SOAH] in which the State Board for Educator Certification [SBEC] has been a party." You indicate SOAH interprets the request to mean those "Proposals for Decision [PFDs] issued by SOAH's Administrative Law Judges (ALJs) and the proposed Final Orders which accompany the PFDs, and which [SBEC] either accepts or modifies." You have provided for our review a representative sample of information that is responsive to the request¹. You assert the requested information is excepted from public disclosure under sections 552.101 and 552.114 of the Government Code. We have reviewed the information you have submitted and considered the exceptions you assert.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that samples "B1" and "B2," because they contain criminal history information, are made confidential by statute, specifically

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Title 4, Subtitle B, Chapter 411 of the Government Code. Section 411.082 of the Government Code defines “criminal history record information” as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(b)(1). We do not agree that the information relating to the criminal background of the individuals in exhibits “B1” and “B2” meets this definition of “criminal history record information.”

You next assert the responsive information is not subject to disclosure under section 552.101 because the information implicates the named individuals’ common-law and/or constitutional right to privacy. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) *there is no legitimate public interest in its disclosure.* (emphasis added) *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

We find the information in exhibit “B1” directly pertains to the qualifications of an applicant for a teacher certificate. The situation here is analogous to that of an applicant for employment with a governmental body. This office has found information pertaining to the qualifications of such applicants to be of legitimate public interest, and therefore not subject to the common-law right to privacy. Open Records Decision Nos. 542 (1990) (information about the qualifications of a public employee is of legitimate concern to the public); 467 (1987) (same). We note, however, that exhibit “B1” also contains a compilation of the named individual’s criminal history. Where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. *See United States Dep’t of Justice v. Reporters Comm. for*

Freedom of the Press, 489 U.S. 749 (1989) (concluding that federal regulations which limit access to criminal history record information that states obtain from the federal government or other states recognize privacy interest in such information). Similarly, open records decisions issued by this office acknowledge this privacy interest. See Open Records Decision Nos. 616 (1993), 565 (1990). We have marked for redaction the specific information in exhibit "B1" that you must withhold as it implicates the named individual's right to privacy.

Regarding exhibit "B2," in which the named individual, a school superintendent, was convicted of a felony offense involving the misuse of public funds, this office has stated: "[t]he public has a substantial interest in knowing whether their public servants are carrying out their duties in an efficient and law-abiding manner, *particularly in matters involving the handling of public funds.*" (emphasis added) Open Records Decision No. 447 at 5 (1986). The information in exhibit "B2" is not protected by a common-law right of privacy because it is of legitimate public interest, and the public interest clearly outweighs any constitutional privacy interests of the named individual under facts as described in exhibit "B2."

Regarding exhibit "C," in which the PFD recommends revocation of a teacher certification because the named individual allegedly exposed himself to three named juveniles, we find a legitimate public interest exists regarding the alleged behavior of the named individual, in that the public has a right to know whether an individual licensed to supervise the youth of this state has engaged in such improper conduct. We therefore do not agree that the document implicates the named teacher's common-law or constitutional right to privacy. We do find the information implicates the common-law right to privacy of the victims who are named. Open Records Decision No. 628 (1994). We have marked for redaction the specific information you must withhold².

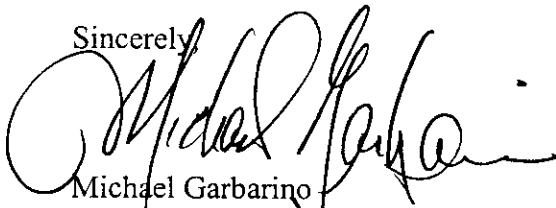
Regarding exhibit "D," in which the named individuals were accused of cheating on a certification exam but the allegations were not proven, you argue that release of the information "would unnecessarily defame the characters and injure the reputations of the individuals involved." You aver "SOAH is concerned that the release of this PFD would 'falsely imply, even if by innuendo . . .' that the subject individuals had not attained their respective [teacher] certificates honestly [citations omitted]." Thus you essentially argue the doctrine of "false light" invasion of privacy. The information at issue in exhibit "D" arose from a complaint about the job-related performance of the two teachers, in that taking the certification exam is a necessary prerequisite to the licensing and employment of the named individuals in the teaching profession. We note as discussed *supra* that the common-law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance, see also Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Since 1990, this office has held that "false light" privacy

²Because we find the names of the victims must be withheld under the common-law right to privacy, we do not address your additional arguments against disclosure of that information.

is not a proper consideration under the Public Information Act. Open Records Decision No. 579 (1990). Additionally, in *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994), the Texas Supreme Court concluded that Texas does not recognize the tort of "false light" invasion of privacy. Therefore, SOAH may not withhold the requested information in exhibit "D" under the doctrine of "false light" privacy or common-law privacy. We find no information in exhibit "D" that implicates the named individual's constitutional right to privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 129027

Encl. Submitted documents

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(w/o enclosures)